

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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Direct Access to the
INTELSAT System

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IB Dkt. No. 98-192

File No. 60-SAT-ISP-97

COMMENTS OF SPRINT COMMUNICATIONS COMPANY, L.P.

I. INTRODUCTION AND SUMMARY

Sprint Communications Company, L.P. (Sprint) respectfully submits the following comments regarding the above-referenced Notice of Proposed Rulemaking.¹ Sprint fully supports the Commission's tentative conclusion that, as a matter of law and of policy, the Commission can and should permit U.S. carriers Level 3 direct access to INTELSAT.² In addition, Sprint urges the Commission to allow: (1) a reasonable "fresh look" period with respect to existing long-term contracts between COMSAT and its U.S. carrier customers; and (2) portability of INTELSAT space segment capacity commitments between COMSAT and INTELSAT.

Since the passage of the Telecommunications Act of 1996 and the implementation of the WTO Agreement on Basic Telecommunications, the United States has called for the abolition of all monopolies in telecommunications services, except one: Comsat's monopoly with respect to access to INTELSAT. If competition in other areas of telecommunications is in the public interest, it would be inconsistent, both as a legal and a policy matter, for the Commission to carve

¹ Direct Access to the INTELSAT System, Notice of Proposed Rulemaking, IB Dkt. No. 98-192, File No. 60-SAT-ISP-97 (rel. Oct. 28, 1998) (Direct Access NPRM).

² Level 3 direct access permits customers to enter into a contractual agreement with INTELSAT for ordering, receiving, and paying for INTELSAT space segment capacity at the same rate that INTELSAT charges its Signatories. Id., at ¶ 8.

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out a monopoly for COMSAT. As the Commission correctly concludes, the Communications Satellite Act of 1962³ grants the Commission the authority to require direct access. Indeed, as others have demonstrated before, the public interest obligates the Commission to provide U.S. carriers with the option of direct access.⁴

Contrary to Comsat's claim, Comsat's monopoly finds no protection in either the Satellite Act, previous Commission orders, or in federal court decisions regarding COMSAT. Second, the continuation of Comsat's monopoly over INTELSAT capacity runs contrary to the pro-competitive goals of both the 1996 Act and the WTO Agreement. At a time when nations around the world are beginning to knock down barriers to competition, the United States should not be perceived as allowing competition on a selective basis. If the Commission allows one private corporation to maintain a monopoly over a vital telecommunications service, it will send a signal to all other countries that they too can choose to maintain at least one monopoly service.

Comsat's monopoly on access to INTELSAT capacity is not in the public interest. It results in higher prices, fewer choices and lower quality services for U.S. consumers. Carriers such as Sprint that must rely on INTELSAT services are forced to pay COMSAT monopoly rents for its role as nothing more than a middleman between carriers and INTELSAT. Sprint must then pass along these above-cost rates to U.S. consumers in the form of higher prices. By requiring direct access, the Commission would ensure that U.S. consumers benefit from more cost-based rates for international services that depend on INTELSAT services.

³ Pub. L. No. 87-624, 76 Stat. 419 (1962) (codified as amended at 47 U.S.C. §§ 701-744) (Satellite Act).

⁴ See, Satellite Users Coalition, "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT System," filed on March 6, 1998 ("Coalition Legal Analysis").

Finally, there may be no need for the Commission to take any further action on the instant Notice of Proposed Rulemaking should Congress act first in requiring direct access, "fresh look," and portability.

II. THE COMMISSION HAS AMPLE AUTHORITY TO REQUIRE DIRECT ACCESS, "FRESH LOOK," AND PORTABILITY

As the Commission rightly concludes, direct access is consistent with the Satellite Act. Nothing in the terms of that statute confers on COMSAT the exclusive role of providing access to the INTELSAT system. The Act authorizes COMSAT to "furnish, for hire, channels of communication" to carriers and authorized users."⁵ As the Commission has already observed, this statutory provision lacks any language conferring exclusive authority to COMSAT. This is in stark contrast to the portions of the Satellite Act that explicitly grant COMSAT exclusive authority to act within the INTELSAT system. For example, the Act provides that "United States participation in the global system shall be in the form of a private corporation subject to appropriate governmental regulation."⁶ Under that provision, COMSAT is authorized to act as the sole U.S. representative on the INTELSAT Board of Governors, as well as the Meetings of Signatories participating in INTELSAT.

In brief, Congress expressed its will explicitly where it wished COMSAT to have an exclusive role to play with respect to INTELSAT. Because it did not grant COMSAT exclusive access to INTELSAT space segment capacity, Congress gave the Commission the discretion to allow carriers the option of contracting directly with INTELSAT for access to U.S. space segment capacity.

⁵ 47 U.S.C. § 735(e).

⁶ 47 U.S.C. § 701(c) (emphasis added).

Moreover, now that INTELSAT allows non-Signatory carriers to obtain space segment capacity directly from INTELSAT,⁷ Sprint respectfully submits that the Satellite Act requires the Commission to permit U.S. carriers the option of direct access to INTELSAT. Specifically, Section 201(c) requires the Commission to:

ensure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to, the communications satellite system and satellite terminal stations under just and reasonable charges, classifications, practices, regulations, and other terms and conditions...⁸

Consistent with this provision, the decision by INTELSAT to allow non-Signatory carriers to obtain direct access requires the Commission to change its policy with respect to direct access as well.⁹

Currently, only COMSAT enjoys exclusive use of, and access to, the INTELSAT system in the United States. It is therefore no surprise that COMSAT is able to charge other carriers the estimated 68 percent average mark-up over the underlying INTELSAT Utilization Charge (IUC) paid by COMSAT to INTELSAT.¹⁰ COMSAT can charge monopoly rents for INTELSAT access because it faces no competition in the U.S. INTELSAT space segment market. Because the Satellite Act requires the Commission to ensure that all authorized carriers, including Sprint, have "nondiscriminatory use of, and equitable access to" INTELSAT, the Commission must eliminate Comsat's monopoly over INTELSAT access. No amount of price regulation of COMSAT will ensure that carriers other than COMSAT obtain space segment capacity on a nondiscriminatory and equitable basis. Where, as here, competition will reduce charges to cost

⁷ Direct Access NPRM at ¶ 8. This was not the case when the Commission last considered direct access to INTELSAT in 1984.

⁸ Id., § 201(c)(2), 47 U.S.C. §721(c)(2).

⁹ See also, Bechtel v. F.C.C., 957 F.2d 873 (D.C. Cir. 1992) at 881 ("changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so").

¹⁰ Coalition Legal Analysis at 5.

more adequately than regulation, the Commission must, consistent with Section 201(c) of the Satellite Act, mandate direct access. In doing so, the Commission will greatly diminish Comsat's ability to discriminate against competing authorized carriers.

Sprint also agrees with the Commission that none of the precedent cited by COMSAT establishes that, under the Satellite Act, COMSAT is the *de jure* exclusive provider of INTELSAT space segment capacity.¹¹ In the decisions cited by COMSAT in the COMSAT Non-Dominant Proceeding, the Commission never squarely addressed whether the Satellite Act proscribed the Commission's ability to mandate direct access. Instead, these decisions merely recited the reality that at the time of the Commission's rulings, COMSAT was the monopoly provider of INTELSAT space segment. As a result, nothing in Commission precedent contradicts the Commission's tentative conclusion today that it may allow all carriers to obtain direct access to INTELSAT.

Similarly, the federal court decisions cited by COMSAT do not establish that COMSAT is, under the Satellite Act, the *de jure* monopoly provider of INTELSAT space segment. In fact, a decision by the D.C. Circuit Court of Appeals recognizes the Commission's ability to permit direct access as it has in the instant Notice of Proposed Rulemaking.¹² In upholding the Commission's decision in 1984 not to allow direct access, the Court noted that the Commission had rightfully reserved the ability to permit direct access in the future, should the Commission find that other measures taken to curb Comsat's monopoly position were inadequate.¹³

¹¹ Direct Access NPRM at ¶¶ 27-28 (citations omitted); see also Comsat "An analysis of FCC's Authority to Mandate 'Direct Access' to the INTELSAT System," filed by COMSAT Corporation, dated Dec. 24, 1997.

¹² WUI v. FCC, 804 F.2d 1280 (D.C. Cir. 1986).

¹³ Id., at 1292-93.

Sprint also supports the Commission's tentative conclusion that permitting direct access would not violate the U.S. Constitution's Fifth Amendment.¹⁴ Contrary to Comsat's previous claims, permitting direct access would not result in an uncompensated "taking" of COMSAT property. As the Commission demonstrates, neither the Satellite Act nor the regulatory scheme created by it confers on COMSAT an exclusive right to access INTELSAT satellites from the United States. Thus, there is nothing to be taken from COMSAT. The Commission also concludes correctly that COMSAT possesses no contractual property right with respect to its access to INTELSAT satellites that could be considered vested property within the meaning of the Fifth Amendment. Finally, Sprint agrees with the Commission's conclusion that direct access would not result in a permanent physical occupation, a physical invasion or an economic regulation of Comsat's private property that would constitute a taking requiring just compensation under the Fifth Amendment.

III. U.S. CARRIERS AND CONSUMERS WOULD DERIVE SUBSTANTIAL PUBLIC INTEREST BENEFITS FROM LEVEL 3 DIRECT ACCESS

The record in the COMSAT Non-Dominant Proceeding clearly demonstrates that under current regulation, COMSAT exercises its market power over U.S. INTELSAT access to extract monopoly rents from other U.S. carriers. The Satellite Users Coalition established that COMSAT rates are 250 percent higher than the INTELSAT Utilization Charge (IUC), allowing COMSAT to realize an average margin over the IUC of 68 percent.¹⁵ In return for these extraordinary charges, COMSAT adds very little economic value, but merely acts as a middleman between INTELSAT and U.S. carriers. By any economic measure, these figures demonstrate that current regulation of COMSAT allows it to reap supranormal profits, to the

¹⁴ Direct Access NPRM at ¶ 32.

¹⁵ Id., at ¶ 45, citing Coalition Legal Analysis at 17, 23-24.

detriment of U.S. carriers consumers. By allowing direct access, the Commission would ensure that the charges paid for INTELSAT access would be driven downward to the IUC. Direct access would therefore reduce carriers' cost of providing service, allowing U.S. consumers to benefit from lower prices for international services reliant on INTELSAT space segment capacity. Under these circumstances, direct access is clearly in the public interest.

Currently, Comsat is the sole provider of switched voice, private line and occasional use video services to many foreign countries from the United States. For service to these markets, carriers such as Sprint do not have alternative means of sending traffic other than via INTELSAT services. By introducing direct access, the Commission would, as it recognized in the Comsat Non-Dominant Order: (1) reduce Comsat's bottleneck over access to U.S. INTELSAT capacity serving these markets; (2) give U.S. carriers the option of using another supplier; and (3) reduce Comsat's market power in these markets.¹⁶

The Commission should also permit direct access for service to all markets, without attempting to distinguish between "competitive" and "non-competitive" routes. In the Foreign Participation Order,¹⁷ the Commission observed that analysis of market conditions in foreign markets required substantial commitments of Commission time and resources. As a result, the Commission correctly decided to abandon as much as possible the obligation to perform such complex foreign market analyses.¹⁸ It does not appear to make much sense for the Commission to resume analyzing foreign market conditions in order to determine whether to permit direct access. Rather, the Commission should allow market conditions to determine which facilities carriers should use to serve any given international route. Otherwise, the Commission will find

¹⁶ Comsat Non-Dominant Order at ¶ 155, cited in the Direct Access NPRM at ¶ 27.

¹⁷ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order on Reconsideration, 12 FCC Rcd 23,891 (1997), recon. pending (Foreign Participation Order).

itself besieged with petitions from Comsat, U.S. carriers and users requesting the Commission to permit or restrict direct access on a route-by-route basis.

Comsat correctly points out that Teleglobe, the Canadian INTELSAT signatory, is aggressively pursuing U.S. customers for its INTELSAT service offerings. In order for U.S. carriers to take advantage of Teleglobe's offer, they must route their traffic to or from an earth station located in Canada. This is a costly and economically inefficient method of traffic routing that may be competitive with Comsat only because Comsat's rates are so exorbitant. In short, it is a form of arbitrage that would not exist were access to INTELSAT available in the United States at the IUC rate. Therefore, the Commission should not consider Teleglobe's offering as evidencing the lack of need for direct access in the United States.

When the Commission determined in 1984 not to permit direct access,¹⁹ the international telecommunications marketplace was very different from today. In 1984, neither of Sprint's former parent companies, United Telecom and GTE Corp., provided international telecommunications services on any significant scale. At that time, there was little alternative to AT&T and Comsat for the provision of international services. Due to AT&T's facilities monopoly at that time, direct access might have had an adverse impact on satellite technology. Under these conditions, the Commission's ruling in 1984 not to allow direct access was perhaps appropriate.

But the reasoning underlying the Commission's 1984 decision would be inappropriate for today's increasingly competitive environment. Eight years following this decision, INTELSAT began allowing non-Signatory carriers to obtain space segment capacity directly from

¹⁸ *Id.*, at ¶ 35.

INTELSAT.²⁰ In addition, INTELSAT itself has described the significant benefits that direct access may offer to customers, including avoidance of the types mark-up costs that Sprint must now pay Comsat for its middleman role.²¹ Under these changed circumstances, Sprint respectfully submits that the Commission is obligated to change its policy with respect to direct access.²²

The Commission should not undercut the public interest benefits that would flow from direct access by allowing COMSAT to recover any additional fees (above the IUC) from those carriers taking advantage of direct access. Instead, other carriers should be able to obtain INTELSAT space segment capacity at the same rate as COMSAT, *i.e.*, the IUC. As the U.S. Signatory, COMSAT is already guaranteed a 17 to 21 percent return on its investment in connection with Level 3 direct access usage in the United States.²³ In Sprint's view, this is more than adequate to compensate COMSAT for its signatory functions.

Even in the absence of any COMSAT cost figures, the sufficiency of the IUC as compensation for Comsat's signatory functions is supported by the experience of at least one other INTELSAT signatory. It is Sprint's understanding that British Telecommunications PLC (BT), which serves as the United Kingdom's INTELSAT signatory, does not receive any additional compensation for its signatory functions. Nor does it receive any compensation (other than the IUC) from direct access users for any other "unavoidable support costs." As a consequence, direct access is available to carriers in the United Kingdom at a rate equal to the IUC. Sprint can find no justification why U.S. carriers wishing to obtain direct access in the

¹⁹ Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, Report and Order, 97 FCC 2d 296 (1984) (1984 Direct Access Order), *aff'd sub nom. Western Union International v. FCC*, 814 F.2d 1280 (D.C. Cir. 1986).

²⁰ Direct Access NPRM at ¶ 8.

²¹ Id., at ¶ 44.

United States should have to pay any more than their counterparts in the United Kingdom. Any charge above the IUC appears to compensate COMSAT for its inability to operate efficiently. This kind of efficiency is clearly not in the public interest.

Already, as the Commission acknowledges, 93 other nations permit some form of direct access. One of those nations, the United Kingdom, ensures that carriers have Level 3 direct access at the IUC rate. In general, the United States has been at the forefront of introducing telecommunications competition. Unfortunately, with respect to access to INTELSAT capacity, the United States has been more of a laggard than a pioneer. Sprint applauds the Commission's decision to rectify this anomalous situation by proposing to introduce Level 3 direct access into the United States. Sprint urges the Commission to adopt its tentative conclusion and thereby allow U.S. carriers consumers to benefit from international services that will be lower priced, more innovative and of better quality once Comsat's monopoly is eliminated.

IV. MEANINGFUL DIRECT ACCESS REQUIRES "FRESH LOOK" AND PORTABILITY

In order for direct access to have a positive, meaningful impact for consumers, the Commission must also adopt two other measures. These are: (1) a reasonable "fresh look" period for existing long-term contracts between COMSAT and its U.S. carrier customers; and (2) portability of INTELSAT space segment capacity commitments between COMSAT and INTELSAT.

Like other carriers utilizing INTELSAT services, Sprint has been forced to commit to long-term contracts with COMSAT in order to obtain lower mark-ups than COMSAT would otherwise charge on short-term contracts. Absent "fresh look," as well as a release from any

²² See note 9, *supra*.

²³ Direct Access NPRM at ¶ 48.

contract termination liability, Sprint and the majority of other carriers would be unable to obtain the competitive benefits of direct access for the duration of Sprint's long-term contracts.

The Commission has twice before allowed "fresh look" under circumstances similar to those faced by carriers with long-term contracts like Comsat's. "Fresh look" was first promulgated in the Commission 1991 ruling in CC Docket No. 90-132 which relaxed regulation of AT&T.²⁴ In that decision, the Commission feared that AT&T might leverage its control over a customer's 800 number by encouraging a customer to subscribe to a long term Tariff 12 package that included not only 800 service but other services as well. Thus, AT&T could lock in customers and prevent them from moving their service to a competing carrier even after 800 portability arrived. In order to avoid that result, the Commission required that AT&T customers subscribing to Tariff 12 packages that included inbound - *i.e.* 800- service be permitted to terminate those packages without penalty within 90 days of the time that 800 numbers became portable.²⁵

The Commission also applied a limited fresh look requirement in its First Report and Order in CC Docket No. 91-141, the Expanded Interconnection proceeding.²⁶ There, the Commission found that monopoly or dominant incumbent local exchange carriers (ILECs) would "lock up" customers for dedicated short haul circuits under long term arrangements that carried high termination charges.²⁷ The Commission adopted a "fresh look" requirement in order to make it easier for competitive access providers, who would soon be able to better compete against incumbent local carriers, to market to such customers.

²⁴ See Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991), recon. 7 FCC Rcd 2677 (1992).

²⁵ Id., 6 FCC Rcd at 5906.

²⁶ Expanded Interconnection, 7 FCC Rcd 7369 (1992), recon. 8 FCC Rcd 127 (1992), further recon. 8 FCC Rcd 7341 (1993), reversed sub nom. Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

Although the fresh look requirement was reversed on appeal, the FCC reaffirmed the necessity for a fresh look requirement on remand and relied on the same reasoning in doing so.²⁸ The Commission found that without a fresh look, customers obtaining service under local exchange carrier term discount plans would not have a "reasonable chance to take advantage of new competitive opportunities made possible by expanded interconnection"²⁹

In summary, the Commission has found "fresh look" necessary where a carrier with market power in a relevant market has locked up a customer pursuant to long term arrangements and that market is, by Commission decision, subsequently opened to competition. In the case of 800 service fresh look, the Commission found that AT&T had market power over certain 800 service customers who could not easily transfer their 800 business to other carriers. In the case of high capacity local point-to-point service, the incumbent local exchange carrier was able to seal off some customers from impending competition by competitive access providers through the use of long term arrangements with high termination charges. Also, in both of these cases, the Commission required "fresh look" in order to further its pro-competitive policies.

Consistent with these past two decisions, the Commission can and should adopt a "fresh look" requirement in conjunction with allowing carriers direct access to INTELSAT. Like AT&T and the ILECs in the cases cited above, Comsat has exercised its market power over INTELSAT space segment capacity in the U.S. market to compel carriers such as Sprint to sign long-term contracts. Under these circumstances, "fresh look" is entirely appropriate. Should the Commission allow carriers the option of contracting directly with INTELSAT, it should also enable all of those who previously had no choice but to sign long-term contracts with Comsat the

²⁷ Id., 7 FCC Rcd at 7463.

²⁸ Expanded Interconnection, 75 RR 2d 1040 (1994).

²⁹ Id., at 1083.

opportunity to renegotiate them. "Fresh look" would also help fulfill the Commission's stated goal of increasing competition in the international telecommunications market. Carriers would take advantage of a "fresh look" period to negotiate better rates for INTELSAT capacity, which in turn would be passed on to consumers in the form of lower prices.

Without "fresh look," direct access would be essentially meaningless for Sprint. Unless the Commission allows carriers like Sprint to renegotiate, without termination liability, their contracts with Comsat, these carriers would not be able to take advantage of the better rates available directly from INTELSAT. In addition, it would also unfairly favor new entrants who, unburdened by the termination liability clauses present in Sprint's long-term contracts with Comsat, would be able to take advantage of direct access immediately. While these new entrants would be able to obtain service directly from INTELSAT at the IUC rate, Sprint would be forced to continue to pay COMSAT its monopoly markup in addition to the IUC. Consequently, Sprint urges the Commission to allow carriers utilizing INTELSAT services with long-term contracts or commitments a period of six months following the implementation of direct access to renegotiate these commitments with COMSAT.

In addition, the Commission should ensure portability of INTELSAT space segment capacity controlled by COMSAT. The competitive benefits of direct access can be realized only if COMSAT is required to make INTELSAT capacity available when a COMSAT customer takes advantage of "fresh look" to move to another carrier. Otherwise, COMSAT will be able to thwart customer defections to INTELSAT and thereby once again render direct access meaningless.

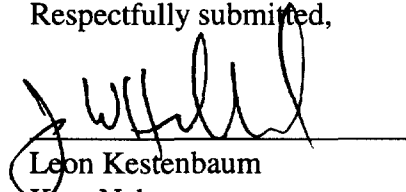
Finally, the need for the Commission to impose these conditions may not be necessary should Congress act first in requiring direct access, "fresh look" and portability. In the event that

Congress appears determined to remedy the current situation with respect to Comsat's monopoly on INTELSAT access, the Commission should defer to Congress's judgment regarding the federally-established private corporation.

V. CONCLUSION

For the reasons stated above, Sprint supports the Commission's tentative conclusion that direct access to INTELSAT is in the public interest. In addition, Sprint urges the Commission to allow (1) a reasonable "fresh look" period for long-term contracts between COMSAT and its INTELSAT space segment customers; and (2) portability of INTELSAT space segment capacity commitments between COMSAT and INTELSAT.

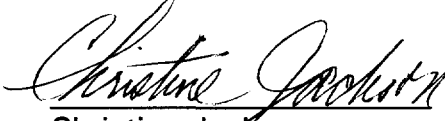
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Leon Kestenbaum', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Comments of Sprint Communications Company LP** was sent by hand on this the 22nd day of December, 1998 to the below-listed parties:


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December 22, 1998

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